6-27-1995

State of New York Public Employment Relations Board Decisions from June 27, 1995

New York State Public Employment Relations Board

State of New York Public Employment Relations Board Decisions from June 27, 1995

Keywords

NY, NYS, New York State, PERB, Public Employment Relations Board, board decisions, labor disputes, labor relations

2A- 6/27/95

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

HEWLETT-WOODMERE FACULTY ASSOCIATION,

Charging Party,

-and-

CASE NO. U-14188

HEWLETT-WOODMERE UNION FREE SCHOOL DISTRICT,

Respondent.

SCHLACHTER & MAURO (DAVID SCHLACHTER of counsel), for Charging Party

EHRLICH, FRAZER & FELDMAN (JEROME H. EHRLICH of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Hewlett-Woodmere Union Free School District (District) to an Administrative Law Judge's (ALJ) decision. After a hearing, the ALJ held that the District violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act), as alleged by the Hewlett-Woodmere Faculty Association (Association), when it hired nonunit Civil Service Librarians (Librarian) to replace three unit Library Media Specialists (LMS).

The District argues in its exceptions that the ALJ should have dismissed the charge because the duties and qualifications of the two positions are substantially dissimilar and the title substitution effected a change in its level of services. The

Association in response argues that the ALJ's findings and conclusions are correct and her decision should, therefore, be affirmed.

For the reasons set forth below, we affirm the ALJ's decision.

This case involves a transfer of unit work effected by the abolition of a unit position and the reassignment of duties to a nonunit position. The means by which that transfer of work was effected, however, does not change the negotiability analysis, which the ALJ correctly recognized is controlled by Niagara Frontier Transportation Authority (hereafter Niagara).[1/] In Niagara, it was held that an employer's unilateral transfer of unit work violates §209-a.1(d) of the Act if the duties transferred have been performed by unit employees exclusively and the duties as transferred are substantially similar to those previously performed by unit employees, unless the employer establishes that the qualifications for the job have been changed significantly. A change in job qualifications, however, does not necessarily exempt the employer from a duty to negotiate the transfer of exclusive unit work. The change in qualifications is at best a factor to be balanced with all other relevant factors in making the negotiability determination.

The District concedes the Association's exclusivity over the work in issue prior to its transfer.

[1/] 18 PERB ¶3083 (1985).

The second Niagara component requires a substantial similarity of the work performed by the unit employees and the employees to whom the work is transferred. In making the equivalency determination, the relevant examination is of the duties actually performed, not the duties that can be required.[2/]

In East Ramapo Central School District[3/] (hereafter East Ramapo), it was held that the abolition of a library media specialist position and the transfer of the duties of that position to a newly created, nonunit civil service librarian violated the employer's duty to negotiate because the record in that case showed that there were not any significant differences in the duties actually rendered by the two positions. In that case, the Board rejected implicitly the argument that certification and teaching potential should be of controlling importance in determining the similarity of duties, a point it later specifically adopted in Avoca Central School District[4/] (hereafter Avoca).

This case is not subject to any analysis or outcome different from that in East Ramapo. As in East Ramapo, the

---

[2/]Tonawanda City Sch. Dist., 17 PERB ¶3091 (1984); Avoca Cent. Sch. Dist., 15 PERB ¶3128 (1982); North Shore Union Free Sch. Dist., 11 PERB ¶3011 (1978); Northport Union Free Sch. Dist., 9 PERB ¶3003, conf'd, 54 A.D.2d 935, 9 PERB ¶7021 (2d Dep't 1976).

[3/]10 PERB ¶3064 (1977).

[4/]Supra note 2.

District stresses that the positions and qualifications of an LMS are different from those of a Librarian. That is clearly true.[5/] However, the duties which have actually been performed by the LMSs in this District are encompassed within the position description of a civil service librarian. The District focuses its arguments upon what an LMS can be required to do and then bases its curtailment of service argument primarily upon the loss of that potential use. There is undeniably a significant difference between the types of duties the incumbents of the two positions could potentially perform, but not between the duties actually rendered by them; and it is the latter, not the former, which controls the negotiability analysis under our decisions. This record simply does not support a conclusion that there is any substantial difference between the duties of an LMS and a Librarian as actually performed over time. At best, this record shows limited utilization of an LMS in the past to the potential authorized under an LMS's teaching certificate. In all other respects, the District is simply continuing to receive substantially, if not precisely, the same services as it did before, except at a lower cost, a cost savings effected by the hiring of nonunit personnel to assume the LMSs' duties. As was said in Avoca, supra at 3200:

> When an employer simply alters the qualifications for a unit position without substantially altering the position itself through a significant change in duties,

---

[5/]Smith v. E. Ramapo Cent. Sch. Dist., 97 A.D.2d 795, 16 PERB ¶7528 (2d Dep't 1983).

> it may not, in conjunction therewith, treat the position as lying outside the unit and unilaterally change the terms and conditions of employment of the position's incumbent. To allow such unilateral action would be to allow an employer to circumvent and undermine an employee organization's representative status.

As to the third component in the Niagara analysis, although the qualifications of an LMS and a Librarian are clearly different, the difference in qualifications is substantially unrelated to the duties actually performed. A Librarian is not qualified by certification to teach anything other than library sciences and a Librarian may not develop curriculum, but those duties were not regularly performed by an LMS. The lowering of qualifications in this case by the substitution of Librarians for LMSs did not change, on this record, the services the District had actually been providing. Therefore, the change in qualifications is not a factor sufficient to alter the mandatory negotiability determination otherwise required under our decisions.

We are aware that the District's decision was motivated by a need or a desire to save money. It is, however, precisely because its decision turned upon the labor costs involved that the transfer of work is amenable to resolution in the collective bargaining process.[6/] The bargaining process affords the parties an opportunity, for example, to obtain general or specific salary and benefit compromises which might have

---

[6/]See First Nat'l Maintenance Corp. v. N.L.R.B., 452 U.S. 666, 107 LRRM 2705 (1981).

eliminated the District's felt need to transfer the work outside the unit. Moreover, there may well be alternatives to a work transfer which were within the District's unilateral control. For example, without removing the work from the unit, the District might have been able to effect a form of reclassification of position to reflect a lower level of qualification and duties with a commensurate reduction in salary. The availability, within and without the negotiating process, of alternatives to a unilateral work transfer provides the rationale for the statutory duty to bargain in this context and supports the conclusion that the District violated its bargaining obligation by unilaterally substituting nonunit Librarians for unit LMSs.

For the reasons set forth above, the District's exceptions are denied and the ALJ's decision is affirmed.

IT IS, THEREFORE, ORDERED[7/] that the District:

1. Cease and desist from unilaterally transferring to Librarians the duties exclusively performed by the bargaining unit position of Library Media Specialist.
2. Forthwith restore to the Association's bargaining unit all of the duties previously performed by the Library Media Specialist which were assigned to Librarians.

[7/]We do not believe that the order which issued in Avoca Cent. Sch. Dist., supra note 2, fully remedies the effects of the District's improper practice. Moreover, the order in that case arguably impaired provisions of the parties' collective bargaining agreement, which we do not consider to be appropriate.

3. Forthwith rescind the abolition of the three Library Media Specialist positions in issue and offer reinstatement to those positions to the former incumbents under the terms and conditions of employment currently prevailing in the District for the title of Library Media Specialist, making those reinstated whole for any loss of pay and benefits suffered by reason of their termination, from the date thereof to the effective date of the unconditional offer of reinstatement, with interest at the currently prevailing maximum legal rate.

4. Sign and post the attached notice at all locations ordinarily used to post notices of information to employees in the Association's unit.

DATED: June 27, 1995
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, Member

NOTICE TO ALL EMPLOYEES

PURSUANT TO
THE DECISION AND ORDER OF THE

NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify all employees of the Hewlett-Woodmere Union Free School District represented by the Hewlett-Woodmere Faculty Association that the District:

1. Will not unilaterally transfer to Librarians the duties exclusively performed by the bargaining unit position of Library Media Specialist.

2. Will forthwith restore to the Association's bargaining unit all of the duties previously performed by the Library Media Specialist which were assigned to Librarians.

3. Will forthwith rescind the 1992 abolition of three Library Media Specialist positions and offer reinstatement to those positions to the former incumbents under the terms and conditions of employment currently prevailing in the District for the title of Library Media Specialist, making those reinstated whole for any loss of pay and benefits suffered by reason of their termination, from the date thereof to the effective date of the unconditional offer of reinstatement, with interest at the currently prevailing maximum legal rate.

Dated . . . . . By . . . . . .
(Representative) (Title)

HEWLETT-WOODMERE UNION FREE SCHOOL DISTRICT

. . . . . .

This Notice must remain posted for 30 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

2B- 6/27/95

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

DEER PARK UNION FREE SCHOOL DISTRICT, SUFFOLK EDUCATIONAL LOCAL 870, CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000, AFSCME, AFL-CIO,

Charging Party,

-and-

CASE NO. U-13340

DEER PARK UNION FREE SCHOOL DISTRICT,

Respondent.

NANCY E. HOFFMAN, GENERAL COUNSEL (WILLIAM A. HERBERT of counsel), for Charging Party

COOPER, SAPIR & COHEN, P.C. (ROBERT SAPIR of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Deer Park Union Free School District, Suffolk Educational Local 870, Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA) to a decision by an Administrative Law Judge (ALJ) on a charge filed by CSEA against the Deer Park Union Free School District (District). The charge alleges that the District furloughed unit employees on December 30, 1991, in violation of §209-a.1(d) of the Public Employees' Fair Employment Act (Act), by declaring that day a vacation day for all school personnel. The ALJ held, in reliance upon our recent decision involving these

same parties,[1/] that CSEA had waived by agreement to a management rights clause any right to negotiate regarding the decision in issue.

The 1988-92 contract, in effect when this change was made, gives the District the right to change all existing rules and policies and/or to "institute new rules, regulations, orders and policies on any and all matters and subjects" except as provided in the contract. The contract does not address the scheduling or order of vacation days.

In our earlier decision, we held that this contract language, although broad, was specific in its grant of right to the District and exempted it from a duty to negotiate matters which are not contained in the parties' collective bargaining agreement during the contract term.

CSEA argues that the ALJ should not have dismissed the charge on the basis of our earlier decision because the management rights clause is nonspecific, because the District had negotiated a furlough plan with CSEA which CSEA had rejected, and because the District, in negotiations for the 1992-95 contract, proposed to add a clause which would have empowered it to order employees to use vacation days if the District curtailed operations during the summer. The District argues that the ALJ correctly recognized that our earlier decision is not distinguishable and that it required dismissal of this charge.

[1/]Deer Park Union Free Sch. Dist., 28 PERB ¶3005 (1995).

Having reviewed the record and considered the parties' arguments, we affirm the ALJ's decision.

As we held in our earlier case involving these parties, it is not necessary to a finding that negotiations have been waived or satisfied that the collective bargaining agreement address specifically the exact subject of the improper practice charge, in this case a furlough or a directive that employees take vacation. It is enough that the agreement, even if broad, is a clear grant of right to the employer to take the action which is contested under the improper practice charge. As interpreted in our earlier decision, the parties' agreement gives the District the right to control matters which are not covered by the contract. The District's willingness to negotiate a type of furlough does not effect a loss of right which it otherwise clearly possesses under the contract. Similarly, the District's proposal in subsequent negotiations, which would have afforded the District a specific right to require the use of vacation days during a defined shutdown, does not effect the loss of right which is already present under the existing contract language. The District's earlier willingness to negotiate regarding a furlough and its subsequent desire to negotiate may have been based on a variety of motivations. None, however, necessarily lead to the conclusion that there was a mutual understanding and agreement that the District had no contract right under the 1988-92 agreement to declare a vacation day and require employees to use a vacation day on that specific date.

For the reasons set forth above, CSEA's exceptions are denied and the ALJ's decision is affirmed.

IT IS, THEREFORE, ORDERED that the charge must be, and it hereby is, dismissed.

DATED: June 27, 1995
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

MELINDA S. BANNISTER,

Charging Party,

-and-

CASE NO. U-14785

LOVE CANAL AREA REVITALIZATION AGENCY,

Respondent.

MELINDA S. BANNISTER, pro se

ROBERT P. MERINO, ESQ., for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by Melinda S. Bannister to a decision of an Administrative Law Judge (ALJ) which dismissed her improper practice charge alleging that the Love Canal Area Revitalization Agency (Agency) had violated §209-a.1(a) of the Public Employees' Fair Employment Act (Act) by terminating her from her secretary/receptionist position for engaging in protected activities.

The ALJ found that the Agency[1/] was a public employer within the meaning of the Act, that Bannister had engaged in protected activities, but that the Agency had no knowledge of her

---

[1/]The Agency was created in 1980, pursuant to the General Municipal Law, Article 18-A, §950, as a public benefit corporation with the mission of utilizing federal, state and local funds to revitalize the Love Canal area. The Agency is governed by a Board of Directors made up of nine members, including elected officials and community representatives.

participation. Moreover, the ALJ went on to find that, based on her employment history, Bannister would have been terminated irrespective of her exercise of protected rights.

Bannister excepts to the ALJ's decision, arguing that the record establishes that the Agency was aware of her participation in protected activities and that the reasons given for her termination were pretextual. The Agency supports the ALJ's decision.

Based upon our review of the record and consideration of the parties' arguments, we affirm the decision of the ALJ, although on different grounds.

Bannister was hired by the Agency on June 4, 1990, as a secretary/receptionist. Bannister's one-year evaluation showed a satisfactory, even good, rating with some areas in need of improvement noted. In June 1992, Bannister was evaluated as "needing significant improvement", with unsatisfactory ratings in several categories, and was put on probation for thirty days.[2/]

During the summer of 1992, there was much discussion among the Agency staff, which is unrepresented, about their complaints and concerns regarding their terms and conditions of employment. Bannister scheduled a meeting of employees in July 1992, after work hours, at Kelly's Korner, a local bar/restaurant, to discuss

---

[2/]Noted were Bannister's poor performance in observing work hours, public and employee contacts, planning and organizing, quality and volume of work, acceptance of responsibility, following directions and insubordination to department heads and her supervisor.

these concerns. All employees, except William Broderick, the Executive Director, and Pamela Cramer, his administrative assistant, were invited to attend. Most employees did attend and talked about their problems in dealing with Cramer,[3/] compensatory time, distribution of mail, and personal leave, among other things. The group decided that they needed to be able to formally address their concerns through a grievance procedure. The employees discussed a procedure which would allow a grievance to be submitted by a grievance committee or an individual employee, first to the employee's immediate supervisor, then to the Executive Director, and finally to the Personnel Committee of the Agency Board for resolution.

Bannister testified that the employees wanted to have a grievance committee and a grievance procedure and that "we didn't want it to have to come to [a union], that we just wanted a formal way to get our problems resolved" but that "if we didn't get that we were going to go ahead and have a union." The proposed grievance procedure was drafted by Susan Loughran and James Carr[4/] and then it was circulated for employee comment. Loughran testified that the employees wanted a grievance committee so that they could go to the Personnel Committee as a group, not individually. Bannister was not responsible for any of the drafting of the proposed procedure, although she did make

---

[3/]Cramer was Bannister's immediate supervisor.

[4/]Carr was the Director of Planning and Loughran worked for him.

some revisions, as did the other employees. The employees met again in August 1992 at Kelly's Korner to finalize the procedure. Bannister also scheduled that meeting.

On September 4, 1992, Bannister delivered a letter signed by all Agency employees, except Cramer, to Broderick.[5/] The letter asked Broderick to submit the employees' proposed grievance procedure, which was attached to the letter, to the Agency's Personnel Committee. A meeting of the Personnel Committee with all Agency employees was then scheduled for October 7, 1992, by Terry Kuehn, Chairman of the Committee. The meeting was cancelled on October 7, 1992, but was rescheduled to October 16, 1992.[6/] Several employees, including Bannister, met with the Committee on that date and discussed the proposed grievance procedure and employees' grievances. The Committee indicated that when a new, full-time Executive Director started in January 1993, the problems would be addressed.

William Albond became the Executive Director of the Agency in January 1993. Changes made by Albond after his arrival and the manner in which an altercation between two employees was handled by the Agency prompted the employees to resubmit their proposed grievance procedure. On April 13, 1993, Bannister delivered to Albond a letter, again signed by all employees

---

[5/]As secretary/receptionist, it was one of Bannister's duties to deliver mail to Broderick.

[6/]Apparently the meeting was cancelled on advice of counsel, but when the Agency became aware of the employees' opposition to the cancellation, it was rescheduled.

except Cramer, asking him for the status of the grievance procedure and that he place the proposal on the agenda for the next meeting of the Personnel Committee. Attached to the letter was a copy of the grievance procedure and a copy of the letter to Broderick. Immediately thereafter, Albond called department heads whose names appeared on the letter into his office and questioned them as to why they, as management, would sign an employees' grievance procedure proposal. They removed their names from the letter and spoke to the employees they supervised, informing them of their action. Most of the remaining employees thereafter wrote to Albond requesting the removal of their names from the letter. Bannister made no such request.

Sometime in April 1993, Albond called Bannister into his office and counselled her about her behavior and demeanor at work and her inconsistent performance of assigned tasks. On Secretary's Day, late in April, Albond took Bannister and Cramer out for lunch. During lunch, Bannister asked Albond how he had been able to "coerce" the department heads into removing their names from the letter requesting the grievance procedure and pointed out to Albond that that was a violation of the Wagner Act. Albond and Cramer testified that they thought she was rude and Albond went on to note that he was amused by her referring him to a labor law, because he had done his graduate work in industrial relations.

In June 1993, at the time of her third annual evaluation, Bannister was handed a letter of termination by Albond, citing a

continuation of the problems that had led to her being placed on probation in 1992. She was terminated effective immediately, with two weeks pay.

To establish a violation of §209-a.1(a) of the Act, it must be shown that a public employee was engaged in protected activity, that the employer was aware of the activity and that the complained of action would not have been taken "but for" the employee's protected activity.[7/]

Section 202 of the Act provides that

> [p]ublic employees shall have the right to form, join and participate in, or refrain from forming, joining or participating in, any employee organization of their own choosing.

We find that Bannister and the other Agency employees were not engaged in any activity protected by the Act because they were not engaged in activities in furtherance of forming, joining or participating in an employee organization. Dutchess Community College (Rosen)[8/] (hereafter Rosen) is controlling. In Rosen, the employees had gathered together to discuss the terms of their employment. One employee (Rosen) approached the employer to discuss the employees' concerns, with the knowledge and consent of at least some of them, and to raise some of her own individual issues. No violation was found in her reduction in hours because although she and the other employees may have engaged in

---

[7/]Town of Independence, 23 PERB ¶3020 (1990).

[8/]17 PERB ¶3093 (1984), aff'd, 72 N.Y.2d 42, 21 PERB ¶7014 (1988).

concerted activity, they had not engaged in activity protected by the Act; specifically, they were not seeking to form or to be represented by an employee organization. Likewise here, the employees had spoken among themselves about a union only as an alternative to the grievance committee and grievance procedure they sought from the Agency. If the employees were successful in their efforts to obtain the grievance procedure, they had no desire to form a union. This intention is the antithesis of actions taken to form a union or even to prepare for the actual formation of a union. In addition, as in Rosen, there was no indication to the Agency that the employees were seeking to form a union or to be represented by one under any circumstances. Therefore, we have no occasion to consider whether the presentation of the grievance proposal would have been protected if the Agency had been told that the employees might form a union if the proposal were rejected. The Act was intended to "protect the formal organization of employees, or efforts to form an actual organization, rather than activity, albeit concerted, that is an informal and infrequent airing of grievances without recognized representatives...."[9/]

Based upon this finding, we need not reach Bannister's exceptions. We, therefore, affirm the ALJ's dismissal of the

---

[9/]Rosen v. PERB, 72 N.Y.2d 42, 50, 21 PERB ¶7014, at 7021 (1988). The Court's rationale in Rosen stressed the difference in language between the Act and the National Labor Relations Act, which more broadly covers mutual aid and protection.

charge, but on the ground that Bannister was not engaged in activity protected by the Act.

IT IS, THEREFORE, ORDERED that the charge must be, and it hereby is, dismissed.

DATED: June 27, 1995
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, Member

2D- 6/27/95

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000, AFSCME, AFL-CIO,

Charging Party,

-and-

CASE NO. U-15140

VILLAGE OF MALVERNE,

Respondent.

NANCY E. HOFFMAN, GENERAL COUNSEL (STEVEN A. CRAIN of counsel), for Charging Party

JAMES E. BAKER, ESQ., for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Village of Malverne (Village) to a decision by an Administrative Law Judge (ALJ) on a charge filed by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA). After a hearing, the ALJ held that the Village violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it began using nonunit employees in the autumn of 1993 to assist unit employees in its seasonal leaf collection program. The ALJ found that only unit employees had previously worked the fall leaf collection program, work which the ALJ differentiated from that involved in the collection of leaves incidental to the cleaning of Village property or during its summer yard waste program.

The Village argues that the ALJ did not accurately state the record facts, and that she erred in recognizing a discernible boundary to the fall leaf collection program and failed to give proper weight to the Village's efforts to assign its work force in a "most economical manner". CSEA argues in response that the ALJ's decision is correct and should be affirmed.

Having reviewed the record and considered the parties' arguments, we affirm the ALJ's decision, which we find accurately characterizes the charge and states the material facts.

A transfer of unit work was effected by the Village in the autumn of 1993, when it began using nonunit, part-time employees to work the seasonal leaf collection program. Prior to that date, only unit employees worked that program. The tasks required by that program and the qualifications necessary thereto were entirely unchanged upon the assignment of the part-time employees.

The Village's main arguments on appeal are directed to CSEA's absence of exclusivity over leaf collection. Under Niagara Frontier Transportation Authority,[1/] an employer's duty to negotiate a decision transferring unit work hinges, in large part, upon the demonstration of the union's exclusivity over that work. As the Village correctly observes, nonunit employees, primarily summer seasonals, have collected leaves in conjunction with other tasks, such as cleaning storm drains and dead-end

---

[1/] 18 PERB ¶3083 (1985).

streets and when bagged, with or without other wastes, during the summer yard program. Exclusivity is, nonetheless, maintained over the fall leaf collection program for two basic reasons.

First, as the ALJ detailed in her decision, a reasonable discernible boundary may be drawn around the fall leaf collection program. It is not unusual for an employer to hire nonunit summer employees to help unit employees with cyclical workload demands. The use of that help, however, does not necessarily breach a union's exclusivity over unit work otherwise established and maintained. Indeed, that circumstance formed the basis for the first discernible boundary we recognized.[2/] The nature of the fall leaf operation, its scale, the heavy equipment and staffing needs, and its limited duration clearly distinguish the collection of leaves during the autumn from collections pursuant to other tasks or at other times.[3/]

Second, as we held in County of Onondaga,[4/] the performance by nonunit employees of a task performed by unit employees, but merely as an incident to the performance of nonunit work, does

---

[2/]Town of West Seneca, 19 PERB ¶3028 (1986).

[3/]We have recognized many discernible boundaries to unit work. Through a finding of a discernible boundary, a union may be able to establish exclusivity over the unit work within that boundary which would otherwise have been lost. The one we recognize here is as clear and compelling as any other which has been recognized. See, e.g., City of Rochester, 27 PERB ¶3031 (1994); City of Schenectady, 25 PERB ¶3073 (1992); County of Onondaga, 24 PERB ¶3014 (1991), conf'd, 187 A.D.2d 1014, 25 PERB ¶7015 (4th Dep't 1992); City of Rochester, 21 PERB ¶3040 (1988), conf'd, 155 A.D.2d 1003, 22 PERB ¶7035 (4th Dep't 1989).

[4/]27 PERB ¶3048 (1994).

not breach the exclusivity otherwise maintained by a union over unit work. As such, the fact that leaves in this case were picked up by nonunit employees in conjunction with and ancillary to the performance of other tasks, such as cleaning parks and drains, does not breach CSEA's established exclusivity over the work associated with the fall leaf collection program.

In response to the Village's last exception, we held, in City of Rochester,[5/] that negotiability determinations cannot be based upon the size or the economic condition of any particular party. The Village simply cannot be permitted to violate its bargaining obligations under the Act to enable it to deliver service in what it would consider to be the "most economical manner". The cost of delivering services is certainly a subject appropriate for consideration at the bargaining table, but it is not a justification to avoid bargaining entirely. To accept the Village's argument in this respect would substitute unilateralism, however well intentioned or reasonable, for the bilateralism the Act requires as the means to achievement of its declared public policies. Moreover, acceptance of the Village's argument would destroy any consistency in negotiability determination by subject and eliminate any predictability of result regarding negotiability determinations.

For the reasons set forth above, the Village's exceptions are denied and the ALJ's decision is affirmed.

[5/]27 PERB ¶3031 (1994).

IT IS, THEREFORE, ORDERED that the Village:

1. Immediately cease and desist from transferring to nonunit personnel unit work involving the collection of leaves during the autumn.
2. Forthwith restore all of the duties listed in paragraph one above to CSEA unit employees.
3. Make CSEA unit employees whole for any loss of wages or benefits occasioned by the transfer of the unit work described in paragraph one above since September 1, 1993, with interest at the currently prevailing maximum legal rate.
4. Sign and post the attached notice at all locations ordinarily used to post notices of information to CSEA unit employees.

DATED: June 27, 1995
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, Member

NOTICE TO ALL EMPLOYEES

PURSUANT TO
THE DECISION AND ORDER OF THE

NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify all employees in the unit represented by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA) that the Village of Malverne will:

1. Not transfer to nonunit personnel unit work involving the collection of leaves during the autumn.

2. Forthwith restore all of the duties described in paragraph one above to CSEA unit employees.

3. Make CSEA unit employees whole for any loss of wages or benefits occasioned by the unilateral transfer of the unit work described in paragraph one above to nonunit employees since September 1, 1993, with interest at the currently prevailing maximum legal rate.

Dated . . . . . .

By . . . . . .
(Representative) (Title)

VILLAGE OF MALVERNE

. . . . . .

This Notice must remain posted for 30 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

2E- 6/27/95

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000, AFSCME, AFL-CIO, CLINTON COUNTY LOCAL 810,

Charging Party,

-and-

CASE NO. U-14856

COUNTY OF CLINTON,

Respondent.

NANCY E. HOFFMAN, GENERAL COUNSEL (TIMOTHY CONNICK of counsel), for Charging Party

ANTHONY P. DI ROCCO, for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the County of Clinton (County) to a decision by an Administrative Law Judge (ALJ) on a charge filed by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, Clinton County Local 810 (CSEA). After a hearing, the ALJ held that the County violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) by unilaterally subcontracting the mowing and maintenance of a highway area known as Cumberland Head and by transferring the recycling and paving of certain County roads during 1993, work which the ALJ held CSEA had performed exclusively prior to that time.

The County argues in its exceptions that the ALJ erred in finding a violation of the Act in any respect, in issuing certain

aspects of the remedial order and in dismissing one of its affirmative defenses as a matter of law. CSEA argues in response that the County's exceptions are without merit and that the ALJ's decision and order should be affirmed.

Having reviewed the record and considered the parties' arguments, we affirm the ALJ's decision in part, reverse in part and modify the remedial order.

As to the mowing and grounds maintenance at Cumberland Head, the record establishes CSEA's exclusivity over that work prior to its transfer to the contractor, Turner Brothers, and an identity of tasks before and after that transfer.

In urging us to reverse the ALJ's decision in this regard, the County argues that the subcontract of the work at Cumberland Head produced a "qualitative" improvement of service. There is, however, no demonstrated difference in qualifications as between the County employees and the employees of the private contractor. Moreover, although the County articulated a belief that the contractor had some better equipment, the record does not show that the equipment available to the unit employees is inadequate for the completion of the mowing and maintenance tasks involved. The County's argument rests instead on the contractor devoting more time to the tasks than did the unit employees. That, however, is a fact difference without persuasive effect.

The County, aware of complaints about maintenance at the Cumberland Head area, never took any measures which would ensure that unit employees spent the time necessary to the desired

maintenance of that area. Quite the contrary, the County Administrator simply accepted the Highway Superintendent's representation that other tasks demanded a higher priority. Therefore, the deteriorating maintenance situation, which the County claims primarily[1/] motivated its decision to subcontract this work, was one over which it had full control, and one which was not attributable to the unit employees' inability to address. The County could have reprioritized its work, it could have set performance standards for its employees and its supervisors and it could have taken disciplinary or other action to enforce those priorities and standards. It did none of those things and opted simply to subcontract the unit work. On the very balance of interests the County asks us to undertake, we find nothing to persuade us that the County should be permitted to unilaterally subcontract the mowing and maintenance of the Cumberland Head area when its own decision-making caused the claimed need to remove the work from the unit.

Review of the ALJ's finding that the County also improperly transferred unit work involving highway construction and repaving is more complicated than that undertaken with respect to Cumberland Head because there are several tasks and outside employers involved.

The first finding to which the County excepts involves the County's subcontract with Bell & Flynn to recycle and repave

---

[1/]Its other reason was economic.

approximately four miles of County roads. Road recycling involves the removal and reuse of the old road surface in the repaving of the road. The record evidences that CSEA unit employees had in the past removed old asphalt and had broken it up for reuse in conjunction with repaving. However, the testimony in this respect was brief and nonspecific. The recycling work done by Bell & Flynn necessitated the use of particular equipment which the County never owned or rented. Use of that equipment resulted in a ripping of twelve inches of the existing roadbed and a pulverization of the old blacktop. Daniel Rabideau, the County's Highway Construction Supervisor, and one of CSEA's witnesses, testified that unit employees had not previously worked in that type of recycling project and that the County did not possess the equipment necessary for that task. In that regard, the record also establishes a history of the County using private contractors in conjunction with major construction or repair projects when it lacked the specialized equipment deemed necessary to the performance of the tasks. As to this recycling aspect of the Bell & Flynn contract, therefore, we find that CSEA has not established and maintained exclusivity over the particular work involved and reverse the ALJ's contrary finding.

Bell & Flynn, however, also prepared the roadbed and repaved the road after removing and crushing the old surface. As the record shows CSEA's exclusivity over tasks normally associated with road paving, specialized equipment is not necessary to the preparation of the roadbed and its resurfacing. The preparation

and paving processes are tasks which are separate from the removal and recycling processes. Therefore, Bell & Flynn's road preparation and paving, as well as the road paving projects undertaken by another contractor, Carter's Trucking, breached CSEA's exclusivity and the County's subcontract of that unit work to those firms violated its duty to negotiate with CSEA as found by the ALJ.

The ALJ also found that the County had violated the Act by having employees from the Town of Schuyler do certain paving work on a County road in the summer of 1993. In addition, the ALJ, by footnote to the remedial order, required unit employees to be made whole for lost wages and benefits occasioned by whatever other transfer of paving work there might have been to any other nonunit employees.

The County argues that the ALJ erred by including Town of Schuyler employees and unidentified others in the decision or order because CSEA's charge is specific to the private contractors named therein. Therefore, the County's relationship with others than those named contractors is argued to be beyond our power to review. We agree with the County's conclusion that the ALJ erred in these two respects but for reasons other than those argued by the County.

Under §205.5(d) of the Act, remedial relief in any form is properly directed only against "an offending party". The County is not an offending party except as and to the extent a violation of the Act has been found to have been committed by it. The ALJ

made no finding as to whether any other unit work was in fact unilaterally transferred by the County to unidentified nonunit employees and, therefore, did not find any violation of the Act with respect to those unidentified others. Without a finding of violation, a remedial order may not issue.

For different reasons, the remedial order as it concerns paving by Town of Schuyler employees is also inappropriate. There was but one brief reference to this paving, which was not pleaded, litigated or argued. That passing reference is devoid of the content which would make it dispositive of any issue in this case. As there is not sufficient evidence to support a finding of violation of the Act in this respect, the remedial order is inappropriate.

The remaining aspect of the County's exceptions concerns the ALJ's dismissal of the County's defense that it did not violate the Act because no employee lost his/her position because of the subcontracting. The County argues that the absence of individualized detriment, although not necessarily dispositive in its favor, is a factor which can be considered in deciding whether a violation has occurred and in assessing the need for or the extent of a remedial order.

We agree with the County that although the presence of individualized detriment need not be shown in order to find that unit work has been transferred improperly,[2/] the absence of such

---

[2/]Niagara Frontier Transp. Auth., 18 PERB ¶3083 (1985).

detriment is a factor which can be considered in any necessary balance of interests. We do not read the ALJ's decision, however, to hold that the absence of detriment is immaterial or that she failed to consider that absence of detriment in shaping her decision and order. Clearly, for example, the make-whole aspect of the ALJ's remedial order is applicable only to the extent the unit employees have actually lost wages or benefits because of the subcontracts let in violation of the Act. Damage questions are not ordinarily litigated during the adjudication of an improper practice charge and nothing in this case would call for an exception to that practice. As the ALJ implicitly recognized, the violations found rest upon subcontracting decisions unrelated to any mission interests and involving no change in tasks or qualifications. The absence of individualized detriment in such circumstances does not serve to make those decisions nonmandatory subjects of negotiation, although it would extinguish any entitlement to monetary relief.

For the reasons set forth above, the ALJ's decision is affirmed, except insofar as the County was found to have violated the Act by subcontracting the road "recycling" process to Bell & Flynn and by using Town of Schuyler employees for road paving. The County's exceptions in those two respects are granted. The remedial order is modified to reflect our reversal of the ALJ's findings of violation in these respects and further modified to delete the footnoted reference to "other nonunit employees".

IT IS, THEREFORE, ORDERED that the County:

1. Cease and desist from unilaterally subcontracting to nonunit personnel the mowing and maintenance of Cumberland Head land and the paving of County highways.
2. Restore to unit employees the work of mowing and maintaining Cumberland Head land and the paving of County highways.
3. Make unit employees whole for lost wages and benefits, if any, owing to the performance of unit work by private subcontractors at Cumberland Head and in paving County roads, with interest at the currently prevailing maximum legal rate.
4. Sign and post the attached notice at all locations ordinarily used to post notices of information to CSEA unit employees.

DATED: June 27, 1995
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, Member

NOTICE TO ALL EMPLOYEES

PURSUANT TO
THE DECISION AND ORDER OF THE

NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify all employees of the County of Clinton in the unit represented by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, Clinton County Local 810 that the County:

1. Will not unilaterally subcontract to nonunit personnel the mowing and maintenance of Cumberland Head land and the paving of County highways.

2. Will restore to unit employees the work of mowing and maintaining Cumberland Head land and the paving of County highways.

3. Will make unit employees whole for lost wages and benefits, if any, owing to the performance of unit work by private subcontractors at Cumberland Head and in paving County roads, with interest at the currently prevailing maximum legal rate.

Dated . . . . . By . . . . . .
(Representative) (Title)

COUNTY OF CLINTON

. . . . . .

This Notice must remain posted for 30 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

2F- 6/27/95

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

UNITED PUBLIC SERVICE EMPLOYEES UNION, LOCAL 424, A DIVISION OF UNITED INDUSTRY WORKERS DISTRICT COUNCIL 424,

Petitioner,

-and-

FRANKLIN SQUARE UNION FREE SCHOOL DISTRICT, THREE VILLAGE CENTRAL SCHOOL DISTRICT, BOCES FIRST SUPERVISORY DISTRICT OF SUFFOLK COUNTY, AMITYVILLE UNION FREE SCHOOL DISTRICT, COUNTY OF FULTON and COUNTY OF ORANGE,

Employers,

-and-

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000, AFSCME, AFL-CIO,

Intervenor.

CASE NOS. C-4169, C-4173, C-4176, C-4225, C-4279 & C-4280

In the Matter of

UNITED PUBLIC SERVICE EMPLOYEES UNION, LOCAL 424, A DIVISION OF UNITED INDUSTRY WORKERS DISTRICT COUNCIL 424,

Petitioner,

-and-

VILLAGE OF RHINEBECK,

Employer.

CASE NO. C-4217

In the Matter of

UNITED PUBLIC SERVICE EMPLOYEES UNION, LOCAL 424, A DIVISION OF UNITED INDUSTRY WORKERS DISTRICT COUNCIL 424,

Petitioner,

-and-

CASE NO. C-4235

COUNTY OF ALBANY,

Employer.

In the Matter of

UNITED PUBLIC SERVICE EMPLOYEES UNION, LOCAL 424, A DIVISION OF UNITED INDUSTRY WORKERS DISTRICT COUNCIL 424,

Petitioner,

-and-

HARBORFIELDS CENTRAL SCHOOL DISTRICT,

CASE NO. C-4241

Employer,

-and-

LOCAL 144, LONG ISLAND DIVISION, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO,

Intervenor.

RICHARD M. GREENSPAN, P.C. (STUART A. WEINBERGER of counsel), for Petitioner

BEHRENS, LOWE & CULLEN (BRUCE KAPLAN of counsel), for Franklin Square Union Free School District

GUERCIO & GUERCIO (GREG GUERCIO of counsel), for Three Village Central School District and Amityville Union Free School District

JEFFREY SMITH, for BOCES First Supervisory District of Suffolk County

THOMAS D. MAHAR, JR., ESQ., for Village of Rhinebeck

ROEMER & FEATHERSTONHAUGH, P.C. (WILLIAM M. WALLENS and ELAYNE GOLD of counsel), for County of Fulton

RAINS & POGREBIN, P.C. (BRUCE R. MILLMAN of counsel), for Harborfields Central School District

PROSKAUER, ROSE, GOETZ & MENDELSOHN (KATHLEEN McKENNA of counsel), for County of Orange

NANCY E. HOFFMAN, GENERAL COUNSEL (JEROME LEFKOWITZ and STEVEN A. CRAIN of counsel), for Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO

VLADECK, WALDMAN, ELIAS & ENGELHARD, P.C. (LARRY CARY of counsel), for Local 144, Long Island Division, Service Employees International Union, AFL-CIO

BOARD DECISION AND ORDER

These several cases come to us on exceptions filed by the United Public Service Employees Union, Local 424, A Division of United Industry Workers District Council 424 (Local 424), to a decision by the Director of Public Employment Practices and Representation (Director). The Director dismissed these petitions for certification filed by Local 424 at various dates between late 1993 and June 1994 on the ground that it was not an employee organization on the date the petitions were filed. The Director's decision relied upon our September 1994 decision in Northport-East Northport Union Free School District (hereafter Northport)[1/] in which we dismissed several other of Local 424's

---

[1/]27 PERB ¶3053 (1994), conf'd, 28 PERB ¶7001 (Sup. Ct. Kings Co. 1995).

representation petitions after concluding that Local 424 was not an employee organization. In a subsequent decision dated May 4, 1995,[2/] we found that constitutional changes made in October 1994 removed the restrictions which had disqualified Local 424 as an employee organization, and we ruled that Local 424 is now an employee organization within the meaning of the Act.

Local 424 argues in its exceptions that these petitions (all of which were filed before Northport and before the October 1994 constitutional changes which qualified Local 424 as an employee organization), should not have been dismissed because it was an employee organization when the petitions were filed and is recognized by us to be one now. With respect to the second point of its argument, Local 424 asserts that a representation petition must be processed if the petitioner becomes an employee organization by the time certification should issue pursuant to that petitioner's demonstration of majority status. The Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA), which represents six of the at-issue units, and Local 144, Long Island Division, Service Employees International Union, AFL-CIO (SEIU), which represents one unit in issue, argue that the Director's decision is correct and should be affirmed.

Having considered the parties' arguments, we affirm the Director's decision.

[2/]28 PERB ¶3025 (1995).

As to Local 424's first argument, we held specifically in Northport that Local 424's failure to meet the requirements of the Act as an employee organization required dismissal of the petitions then before us. Local 424's status prior to its constitutional changes in October 1994 has, therefore, already been decided by us, and will not be further reviewed here. As to its second argument, we stated in Northport that we were not deciding whether certain constitutional amendments which had been made after the filing of those petitions could be applied retroactively to the dates the petitions in Northport were filed.[3/] It was not necessary to decide that question because, even when those amendments were considered, Local 424 still did not qualify as an employee organization within the meaning of the Act. Nevertheless, the very fact that we dismissed the petitions in Northport is a rejection of Local 424's second argument. If, as Local 424 argues, the absence of employee organization status at the date of filing did not require a dismissal of a petition, then the petitions in Northport would not have been dismissed, but would have been instead remanded to the Director for further processing consistent with whatever constitutional changes Local 424 might make up to the date it became eligible for certification. Therefore, Local 424's arguments in this case are merely collateral attacks upon the holding in Northport and the result occasioned thereby.

[3/]27 PERB ¶3053, at 3114.

The several decisions cited by Local 424[4/] in support of its claim that we have in the past accepted and processed certification petitions filed by other than employee organizations are all inapposite. In none of those decisions was there a determination made that the petitioner was not an employee organization as constituted at the date of filing of the petition. Quite the contrary, the holding in each case, either explicitly or implicitly, was that the petitioner was an employee organization.

Local 424 also argues that the Director's decision dismissing these petitions is inconsistent with our decision in County of Albany,[5/] which issued after Northport. In County of Albany, we remanded the petition in C-4235 to the Director for investigation and processing "as appropriate". The Director, acting pursuant to that remand, determined that the only appropriate action which could be taken in light of Northport was to dismiss that petition and the others before us on this appeal. County of Albany does not hold or suggest that Local 424's petition in that case or any other either should or should not be processed for any reason. County of Albany merely represents our unwillingness to bypass the Director's determination on issues which were then pending before him.

[4/]Village of Mineola, 13 PERB ¶3024 (1980); State of New York, 10 PERB ¶3093 (1977); State of New York, 1 PERB ¶399.85 (1968); New York State Thruway, 1 PERB ¶399.81 (1968).

[5/]27 PERB ¶3075 (1994).

Although our discussion to this point is dispositive of Local 424's basic arguments, we would be remiss if we did not also note the serious policy implications raised by Local 424's argument that any noncompliance with a filing requirement can be cured by post-petition conduct. Status as an employee organization is the first and fundamental condition to the filing of a certification petition.[6/] If that condition can be satisfied at any time after the filing of the petition up to the date of certification, then all other conditions attached to the invocation of our representation jurisdiction, such as the defined filing periods, showing of interest and declaration of authenticity requirements, and no strike affirmations, become essentially meaningless. Our representation rules are intended to bring some stability and certainty to a process which profoundly affects the employment rights and interests of many. Those rules cannot be abandoned or ignored by allowing retroactive compliance with their clear dictates without sacrifice of the policies underlying them. Our long-standing, unwavering commitment to those policies necessitates dismissal of these petitions. Our dismissal, however, does not preclude a future presentation of these representation questions pursuant to petitions filed in accordance with our Rules.

For the reasons set forth above, Local 424's exceptions are denied and the Director's decision is affirmed.

[6/]Rules of Procedure §201.2(a).

IT IS, THEREFORE, ORDERED that the petitions in the captioned cases must be, and hereby are, dismissed.

DATED: June 27, 1995
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, Member

2G- 6/27/95

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

WAPPINGERS CONGRESS OF TEACHERS,

Petitioner,

-and- **CASE NO. CP-353**

WAPPINGERS CENTRAL SCHOOL DISTRICT,

Employer.

-and-

SUPERVISORY, TECHNICAL, EXECUTIVE AND PROFESSIONAL ASSOCIATION,

Intervenor.

LYNN DUGGAN, for Petitioner

RAYMOND G. KRUSE, ESQ., for Employer

JAMES R. GREENE, ESQ., for Intervenor

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Wappingers Central School District (District) to a decision by the Director of Public Employment Practices and Representation (Director). After a hearing, the Director placed the positions of physical therapist, occupational therapist, certified occupational therapist assistant and physical therapist assistant into a unit represented by the Wappingers Congress of Teachers (WCT), pursuant to a unit clarification/placement petition filed by WCT under §201.2(b) of our Rules of Procedure (Rules). The Supervisory, Technical, Executive and Professional Association

(STEPS), the representative of a unit of noninstructional employees of the District, intervened in the proceeding, seeking placement of the at-issue positions into its unit. The District agrees with the placement of all of the therapist and assistant positions in the unit represented by STEPS.

The Director found that the therapists and assistants were not in fact in WCT's unit and, therefore, he dismissed the unit clarification aspect of the petition. He concluded, however, that the therapists and assistants share a community of interest with employees in WCT's unit arising from their shared professional concerns and their involvement in the same educational mission. Therefore, the Director placed the positions into WCT's unit, pursuant to the unit placement aspect of WCT's petition.

The District excepts to the Director's decision, arguing that its administrative convenience and the small number of therapists as compared to the large number of teachers in WCT's unit, warrant placement of the therapists and assistants into the noninstructional unit represented by STEPS.[1/] WCT supports the Director's decision.

Based upon a review of the record and a consideration of the parties' arguments, we affirm the Director's decision.

WCT represents a unit of approximately 723 full-time, professional employees in the titles of teacher, special area teacher, teacher-in-charge, librarian, guidance counselor, speech

---

[1/]STEPS did not file exceptions to the Director's decision or a response to the District's exceptions.

therapist, psychologist, coordinator, school social worker and regular substitute. All are certificated under Part 80 of the Regulations of the Commissioner of Education. All may join the New York State Teachers' Retirement System. Almost all employees in the WCT unit are full-time employees, working thirty-five hours per week for ten months a year.[2/]

Approximately thirty-eight employees are in the unit represented by STEPS, which includes the titles of registered nurse, accountant, computer operator, programmer/analyst, systems analyst, programmer, senior programmer, bus driver/trainer, assistant supervisor of transportation, head bus driver, head automotive mechanic, shop foreman, custodial supervisor, senior grounds keeper, senior maintenance mechanic, head maintenance mechanic, and school facilities and operations coordinator. Only the registered nurses and the accountant are licensed. All employees in the STEPS unit may join the New York State Employees Retirement System and all are classified within the Civil Service. Although some of the nurses are part-time employees, the rest of the employees in the STEPS unit are full-time employees.

The physical and occupational therapists are required to have a degree from a four-year college and must be licensed pursuant to Part 76 of the Regulations of the Commissioner of Education. The assistants are required to have a degree from a two-year college or to have completed a two-year, post-secondary

---

[2/]Guidance counselors, psychologists and social workers may work up to four additional weeks in July and August.

program and to be licensed. The therapists and the assistants are 10-month employees, who work between 10.5 and 27.75 hours per week. They are in the classified Civil Service and may participate in the New York State Employees Retirement System.

The therapists and the assistants work with the teachers in assisting the students in achieving educational goals and are invited to attend faculty meetings. The therapists evaluate students and conduct diagnostic tests, based on referrals from teachers and/or the District's Committee on Special Education, then confer with teachers and parents on how best to meet the needs of the students.

The District's administrative convenience argument is based in large part on its division of personnel duties. The District employs two personnel assistants who participate in negotiations with the respective units and also have a role in grievances, disciplinary hearings and arbitrations. One has the sole responsibility for dealing with Civil Service employees and the other deals solely with certificated personnel. They maintain databases and records devoted solely to their areas of responsibility. The District argues that a mixed unit of certificated and Civil Service employees would be "administratively inconvenient" because it would require the creation of a combined database and a new system for tracking retirement reports, as well as a duplication of effort by the two personnel assistants.

As held by the Director, the therapists and the assistants are most appropriately placed into the unit of professional

employees represented by WCT.[3/] They share a strong professional community of interest based upon the requirements for the position and their interaction with the teachers and the students. As part of the District's educational team, their employment interests are closer to those of the teachers and others in WCT's unit than the noninstructional employees represented by STEPS. That the registered nurses are represented by STEPS does not warrant a contrary conclusion. The unit placement of the nurses is not before us in this matter and their placement in the STEPS unit has not been the subject of a unit determination by us. We, therefore, do not deem it appropriate to rely on that placement to decide the most appropriate placement of the therapists and assistants. The unit placement of the therapists and assistants must be determined upon application of the statutory criteria, not other unit placements resulting from other circumstances. While the nurses, the therapists and the assistants may share common licensing requirements, Civil Service status and eligibility for membership in the same retirement system, the therapists and assistants clearly belong in the unit represented by WCT because of their shared involvement in the District's educational mission.[4/] The fact that the therapists and assistants will be in the minority in WCT's unit, as they also would be in the STEPS unit, does not warrant a contrary conclusion for there is no reason to assume

---

[3/]See Enlarged City Sch. Dist. of the City of Amsterdam, 18 PERB ¶3054 (1985).

[4/]Carthage Cent. Sch. Dist., 16 PERB ¶3085 (1983).

that any conflict might arise from their inclusion in WCT's unit.

Finally, we find that the District's administrative convenience argument does not overcome the otherwise appropriate placement of the therapists and assistants in the WCT unit. Under that criterion, we have weighed an employer's claim that a proliferation of units would be a burden on its operation.[5/] The District's claim that its existing database and accounting setup would be better served by one unit configuration than another raises an "administrative convenience" issue which is not sufficient to alter the uniting otherwise required.

The unit placement sought by the petition is granted and the positions of physical therapist, occupational therapist, certified occupational therapist assistant and physical therapist assistant are hereby placed in the unit represented by WCT.

IT IS, THEREFORE, ORDERED that the Director's decision is affirmed and the District's exceptions are dismissed.

DATED: June 27, 1995
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, Member

[5/] See Lawrence Union Free Sch. Dist., 13 PERB ¶3072 (1980).

3A- 6/27/95

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

HALF HOLLOW HILLS MONITOR ASSOCIATION, NYSUT, AFT, AFL-CIO,

Petitioner,

- and -

CASE NO. C-4291

HALF HOLLOW HILLS CENTRAL SCHOOL DISTRICT,

Employer,

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

A representation proceeding having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure of the Board, and it appearing that a negotiating representative has been selected,

Pursuant to the authority vested in the Board by the Public Employees' Fair Employment Act,

IT IS HEREBY CERTIFIED, that Half Hollow Hills Monitor Association, NYSUT, AFT, AFL-CIO (Association) has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit: Included: All monitors.

Excluded: All others.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Half Hollow Hills Monitor Association, NYSUT, AFT, AFL-CIO. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any other question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: June 27, 1995
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, Member

3B- 6/27/95

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

UNITED PUBLIC SERVICE EMPLOYEES UNION, LOCAL 424, A DIVISION OF UNITED INDUSTRY WORKERS DISTRICT COUNCIL 424,

Petitioner,

-and-

CASE NO. C-4407

TOWN OF POESTENKILL,

Employer.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

A representation proceeding having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure of the Board, and it appearing that a negotiating representative has been selected,

Pursuant to the authority vested in the Board by the Public Employees' Fair Employment Act,

IT IS HEREBY CERTIFIED that the United Public Service Employees Union, Local 424, A Division of United Industry Workers District Council 424 has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit: Included: All full- and part-time employees of the Town of Poestenkill Highway Department that hold the titles of laborer, mechanical equipment operator light, mechanical equipment operator heavy and working supervisor

Excluded: All others

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the United Public Service Employees Union, Local 424, A Division of United Industry Workers District Council 424. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: June 27, 1995
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, Member

3C- 6/27/95

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

TEAMSTERS LOCAL 294, IBT, AFL-CIO,

Petitioner,

-and- **CASE NO. C-4379**

VILLAGE OF COXSACKIE,

Employer.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

A representation proceeding having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure of the Board, and it appearing that a negotiating representative has been selected,

Pursuant to the authority vested in the Board by the Public Employees' Fair Employment Act,

IT IS HEREBY CERTIFIED that the Teamsters Local 294, IBT, AFL-CIO has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit: Included: All full-time and part-time laborers in the highway department.

Excluded: Public Works Supervisor and all other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Teamsters Local 294, IBT, AFL-CIO. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: June 27, 1995
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, Member